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Human Rights Protection during the "War on Terror": Two Steps Back, One Step Forward

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The aftermath of the attacks on September 11, 2001 has seen a concerted and sustained rolling-back of many of the fundamental human rights guarantees protected by international law. In the name of security, several States have engaged in practices such as torture, indefinite detention, disappearance and the denial of fair trial rights. The rules of international humanitarian law have also been violated, with some of the central protections denied to persons designated as "unlawful combatants." It has also been claimed that some contemporary legal norms are a hindrance to the pursuit of the "war on terror." John Reid, the United Kingdom's Secretary of State for Defense, has openly questioned the adequacy of international law to deal with the contemporary threat from "international terrorists," specifically identifying the 1949 Geneva Conventions and Additional Protocols as part of an international framework which he perceives as not having adapted to changing circumstances.[1] Since September 11th, there has been an assault on both the human rights of individual persons and on the *corpus* of laws that seeks to protect those rights.

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1. John Reid, MP, Sec'y of State for Def., Address at the Royal United Services Inst. for Def. & Sec. Studies, 20th-Century Rules, 21st-Century Conflict (Apr. 06, 2006), http://www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/ReidAddressesRusiOn20thcenturyRules21stcenturyConflict.htm (last visited Feb. 11, 2007). *See also* Tony Blair, British Prime Minister, Prime Minister's Press Conference (Aug. 5, 2005), http://www.number-10.gov.uk/output/page8041.asp (stating that the "rules of the game are changing" with regard to measures to be taken in the fight against terrorism) (last visited Feb. 11, 2007).

In a perverse way, however, the "war on terror" has provided some opportunity to affirm existing human rights obligations and to increase somewhat the scope of human rights protection. In particular, recent events have clarified aspects of the debate surrounding the application of international human rights law extraterritorially and during times of armed conflict. Through the lens of the ongoing *Al-Skeini* proceedings before the United Kingdom courts, in which the Court of Appeal has decided that both the Human Rights Act 1998 and the European Convention on Human Rights apply to persons detained by British forces in Iraq,[2] this article explores how the search for accountability has led to human rights law applying alongside the traditional legal framework of international humanitarian law in certain wartime circumstances. The *Al-Skeini* case is one of the first in which domestic courts have confirmed the extraterritorial application of human rights law to a State's own agents during a time of armed conflict. These decisions have also highlighted some of the profound challenges that are presented by the application of human rights law during armed conflict and how much remains to be done to resolve the complex inter-relationship between international humanitarian law and human rights.[3]

One such dilemma, which is the particular focus of this article, is the exact scope of a State's extraterritorial human rights obligations and the meaning of "effective control"—the standard that is commonly used to trigger the application of human rights treaties beyond a State's own borders.[4] The article will consider the reasoning of both the High Court and the Court of Appeal in the *Al-Skeini* case, which involved a narrower understanding of "effective control" than that as found by international and regional human rights bodies. It asks, furthermore, whether this control requirement is automatically satisfied where there is an occupation under the laws of armed conflict, given that it was accepted by all parties in the proceedings that the United Kingdom was an occupying power in the Basrah area of Iraq at the time. The article begins with a

2. Al-Skeini v. Sec'yof State for the Def., [2004] EWHC (Admin) 2911, [289]-[245]; Al-Skeini v. Sec'yof State for Def., [2005] EWCA (civ) 1609, [31]-[178].

3. *See generally* RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002). On the challenges *see* Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT'L. REV. RED CROSS 737 (2005); David P. Stewart, *Human Rights, Terrorism and International Law*, 50 VILL. L. REV. 685, 697–98 (2005).

4. *See infra* notes 51–57 and accompanying text.

discussion of the jurisdiction of human rights treaties generally and some instances in which the extraterritorial application of those instruments has come about.

I. EXTRATERRITORIAL JURISDICTION OF HUMAN RIGHTS TREATIES

As with all international treaties, the jurisdiction of human rights treaties is generally provided for within the treaty itself. The International Covenant on Civil and Political Rights obliges each States party to respect and to ensure the rights in the Covenant "to all individuals *within its territory and subject to its jurisdiction*."[5] Article 1 of the European Convention on Human Rights makes no reference to territory, providing that rights and freedoms shall be secured to everyone "within [the] jurisdiction" of the High Contracting Parties.[6] The American Convention on Human Rights likewise talks of persons "subject to [the] jurisdiction" of State parties to it.[7] Other international human rights treaties such as the Convention on the Elimination of Racial Discrimination and the Convention against Torture use the phrase "territory under [the] jurisdiction" of a State party.[8] The crux of these provisions, therefore, is that the human rights obligations of a State will be owed primarily to those persons on the territory of the State, but that such obligations also arise for those persons who are otherwise within that State's jurisdiction, such as those in the power of State agents abroad. Human rights obligations can be said to arise both at home and away.[9]

In and of itself extraterritorial jurisdiction is not a controversial doctrine. International law provides for several jurisdictional bases in addition to territory, including universal jurisdiction and personal jurisdiction based on nationality. The

5. International Covenant on Civil and Political Rights art. 2, para. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (emphasis added).

6. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221.

7. American Convention on Human Rights: Pact of San José, Costa Rica art. 1, Nov. 22, 1969, 1144 U.N.T.S. 123.

8. International Convention on the Elimination of Racial Discrimination art. 3, Mar. 7, 1966, 660 U.N.T.S. 195; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art. 2, para. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

9. *See generally* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno Kamminga eds., 2004).

application of treaties of international humanitarian law during international armed conflicts will invariably involve one State exercising jurisdiction outside of its own territory.[10] In the realm of international criminal law, the International Criminal Court has jurisdiction over crimes committed on the territory of a States party or by nationals of that State, regardless of where the crimes were committed.[11] The responsibility of States for internationally wrongful acts frequently arises for actions carried out beyond a State's own borders.[12]

Given the almost unique nature of a State's human rights obligations, particularly when compared to those accruing to it under international humanitarian law or criminal law, it is not surprising there has been some reluctance on the part of States to concede to extraterritorial human rights obligations, but not, it must be said, any outright rejection of the concept. Least problematically, States have accepted that their diplomatic and consular staff abroad must act in accordance with the State's human rights obligations.[13] But animosity towards the extraterritorial application of human rights treaties arises beyond this context and becomes particularly acute when the context is one of an armed conflict. States have commonly argued that international human rights law was brought into existence in order to regulate the relationship between a State and its own citizens and, furthermore, that it is a concept that is applicable in peacetime only.[14] In a time of war, they would view international humanitarian law as the only legal framework to guide the conduct of belligerents. In 2003, the U.S. Department of Defense pronounced its view that the International Covenant on Civil and Political Rights "does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations

10. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 287 (specifying that the Convention shall apply "to all cases of declared war or of any other armed conflict which may arise *between* two or more of the High Contracting Parties") (emphasis added).

11. Rome Statute of the International Criminal Court art. 12, 2187 U.N.T.S. 90 (1998).

12. *See generally Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its fifty-third session (2001).

13. As noted by the European Court of Human Rights in *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 356.

14. Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 119–20 (Jan. 2005).

of the military during an international armed conflict."[15]

With increasing frequency however, prominent international bodies, including the International Court of Justice, have ruled that a State's human rights obligations can extend beyond its own borders and that human rights law applies at all times, including in times of armed conflict. The United Nations Human Rights Committee has held that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[16] In line with this disjunctive interpretation of the jurisdiction provision of the Covenant, the Committee found that Uruguay violated its obligations under the treaty when its agents abducted a Uruguayan national from Argentina.[17] Similarly, the Inter-American Commission on Human Rights found that the United States had acted contrary to the American Declaration of Human Rights with regard to the mistreatment of persons detained during the invasion of Grenada.[18] In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice pronounced that "the protection of the International Covenant of Civil and Political Rights does not cease in times of war,"[19] and the Court has shown little hesitancy recently in holding States responsible for the violation of their extraterritorial human rights obligations during times of armed conflict.[20]

In times of armed conflict, therefore, both international humanitarian law and human rights law can apply. The Human Rights Committee has taken the view that "both

15. Working Group Report on Detainee Interrogations in the Global War on Terrorism; Assessment of Legal, Historical, Policy, and Operational Considerations (Mar. 6, 2003), available at http://www.globalpolicy.org/empire/un/2004/mar03toruremememotext.htm.

16. U.N. Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004).

17. López Burgos v. Uruguay, Commc'n No. R.12/52, ¶ 12, U.N. Doc. Supp. No. 40 (A/36/40), at 176 (1981).

18. Coard v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, ¶ 37 (2001).

19. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

20. *See, e.g.*, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 1 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

spheres of law are complementary, not mutually exclusive"[21] and the International Court of Justice has confirmed that the maxim *lex specialis derogat generali* should be used to resolve any conflict between the two branches of law.[22] It should be noted that certain human rights obligations may be derogated from if the armed conflict in question amounts to a "public emergency which threatens the life of the nation."[23] The various human rights treaties place stringent restrictions on the power of States to derogate and a number of specific human rights can never be disregarded during a state of emergency.[24]

There is now a growing jurisprudence of various international and regional human rights and judicial bodies confirming that human rights law can apply extraterritorially and during wartime. And as one commentator has put it, "the resisters [to this development] are fighting a losing battle and should lay down their arms and accept the applicability of human rights law in times of armed conflict."[25] The United Kingdom courts have recently joined the ranks of those upholding the application of human rights obligations overseas during conflict. Several cases have been taken under the Human Rights Act 1998, the domestic legislation which has

21. *General Comment No. 31*, *supra* note 16, ¶ 11.

22. *See* Legality of the Threat or Use of Nuclear Weapons, *supra* note 19; Legality Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 20, at 178. For a discussion of the Court's approach to this issue, *see* Louise Doswald-Beck, *Human Rights and Humanitarian Law: Are There Some Individuals Bereft of All Legal Protection?*, 98 ASIL PROC. 353, 353–55 (2004); SHANE DARCY, COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW 176–79 (2007).

23. *See, e.g.*, International Covenant on Civil and Political Rights art. 4, Dec. 19, 1966, 999 U.N.T.S. 171, 174; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 220, 232; American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123, 152. Note the observation by Peter Rowe, however, that "it is difficult to accept that the occupation of the territory [overseas] will show a suitable emergency in the territory of the occupying State." PETER ROWE, THE IMPACT OF HUMAN RIGHTS LAW ON ARMED FORCES 119 (2006).

24. Under the International Covenant on Civil and Political Rights, there can be no derogation from Article 6 (right to life), Article 7 (freedom from torture, cruel, inhumane, or degrading treatment or punishment), Article 8, ¶¶ 1–2 (freedom from slavery and servitude), Article 11 (prohibition of imprisonment for inability to fulfill a contractual obligation), Article 15 (nullem crimen sine lege), Article 16 (right to recognition everywhere as a person before the law), and Article 18 (freedom of thought, conscience, and religion). International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

25. Lubell, *supra* note 3, at 738. *See also* Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995).

given effect to the European Convention on Human Rights in the United Kingdom, with regard to the conduct of British troops participating in the ongoing conflict in Iraq.

II. THE UNITED KINGDOM CASES

The case of *Al-Skeini v. Secretary of State for Defence* came before the High Court in 2004 and involves claims by the relatives of six Iraqi citizens who died in Basrah during the time when the United Kingdom was an occupying power there.[26] Five of those persons had been killed in armed incidents involving British troops, while the sixth, Baha Mousa, was beaten to death while in custody in a British military prison.[27] The High Court had to consider whether the deaths took place within the jurisdiction of the United Kingdom, so as to fall within the scope of the European Convention on Human Rights and the Human Rights Act 1998, and, if so, whether there was a breach of the requirements under Articles 2 and 3 of the Convention.[28]

The High Court held that jurisdiction under the European Convention on Human Rights is "essentially territorial."[29] Although the Court held that exceptions to this principle do exist, such as with regard to embassies or consulates overseas,[30] it felt that there was "complete disagreement as to the width, nature, rationale and applicability of the exceptions" to this principle, even within the jurisprudence of the European Court of Human Rights itself.[31] The High Court identified two jurisdictional bases of relevance to the case in hand: state agent authority over persons and effective control of an area.[32] It rejected the first five claims on the basis that the United Kingdom's jurisdiction could not apply to the territory of another state which is not a party to the European Convention, even if that territory is in the effective control of the State.[33] Iraq was seen as being outside *l'espace juridique* of the European Convention on Human Rights. The Court did hold,

26. Al-Skeini v. Sec'y of State for Def., [2005] W.L.R. 1401, 1406 (Q.B.D.).
27. For the facts of each individual case, see *id.* at 1417–23.
28. *Id.* at 1407.
29. *Id.* at 1425, 1471.
30. *Id.* at 1478.
31. *Id.* at 1427.
32. *See id.* at 1472–74.
33. *Id.* at 1480–82.

however, that a prison operated in the territory of another State by a party to the Convention, as in the facts relating to the sixth claimant, would come within that State's jurisdiction.[34] The Court found that State had not lived up to its requirements to conduct an adequate investigation into the death of Mousa under Articles 2 and 3 of the European Convention and the Human Rights Act.[35]

The first five claimants appealed the High Court decision, as did the Secretary of State with regard to the applicability of the Human Rights Act to the death of Mousa and the finding that there had not been compliance with Articles 2 and 3.[36] The Court of Appeal reiterated the distinction between persons under the control of state agents overseas and the exercise of effective control over territory.[37] With regard to the latter, it noted the call of the Parliamentary Assembly of the Council of Europe that relevant member States accept the full applicability of the European Convention "to the activities of their forces in Iraq, in so far as those forces exercised effective control over the areas in which they operated."[38] Considering the first five victims under the jurisdictional base of "state agent authority," the Court found that unlike Baha Mousa, these victims were "at liberty" when they died, in that none of them "were under the control and authority of British troops at the time when they were killed."[39]

Lord Justice Brooke, delivering the leading judgment, then turned to address the question of whether the troops could be considered in "effective control" of the area of Basrah where the deaths occurred.[40] He noted the requirements for occupation under international humanitarian law and the fact that the Secretary of State had accepted that the United Kingdom was an occupying power, "at least in those areas of southern Iraq, and particularly Basrah City, where British troops exercised

34. *Id.* at 1482–83.

35. *Id.* at 1496–98.

36. The Queen (on the Application of Mazin Jumaa Gatteh Al Skeini et al.) v. Sec'y of State for Def., [2006] 3 W.L.R. 508 *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2005/1609.html. The United Kingdom government now accepted that the European Convention applied to the Mousa case, but arguing that the Human Rights Act did not and that the relatives' only avenue was to the European Court of Human Rights in Strasbourg.

37. *Id.* ¶ 48.

38. *Id.* ¶ 9.

39. *Id.* ¶¶ 109–110.

40. *Id.* ¶ 112.

sufficient authority for this purpose."[41] Lord Justice Brooke distinguished this case from those considered by the European Court of Human Rights with regard to Northern Cyprus and Moldova, because in those cases:

> [P]art of the territory of a contracting state was occupied by another contracting state which had every intention of exercising its control on a long term basis. The civilian administration of those territories was under the control of the occupying state, and it deployed sufficient troops to ensure that its control of the area was effective.[42]

He found that the United Kingdom was not in effective control of the areas in question, given the volatile situation there, the insufficient numbers of British troops, the inefficiency of local police, the intimidation of judges and the lack of control over the civil administration.[43] Although an occupying power, it would be impossible to hold that the United Kingdom was in effective control of Basrah City for the purposes of applying the European Convention on Human Rights.

In addition to the material facts, Lord Justice Brooke gave two other reasons for the conclusion that such "effective control" was lacking. First, to concede that such control existed would oblige the United Kingdom to secure to everyone in Basrah the rights and freedoms guaranteed by the European Convention.[44] Secondly, it was held that it would be wrong to try and promote the "common spiritual heritage" of Europe in a predominantly Muslim country.[45] While the former reason indicates that there remain complex issues to be resolved in the application of human rights law extraterritorially, the latter is quite an interesting proposition given that the members of the Council of Europe have continually stressed that Turkey abide by its obligations under the European Convention.

The United Kingdom courts in the *Al-Skeini* proceedings held that British troops in Basrah did not have obligations under human rights law, as opposed to those accruing under international humanitarian law, towards the first five claimants. Importantly though, the Courts did find that the detained Baha Mousa had been within the jurisdiction of the

41. *Id.* ¶¶ 113–115, 119.
42. *Al Skeini*, [2006] 3 W.L.R. ¶ 120.
43. *Id.* ¶¶ 121–123.
44. *Id.* ¶ 124; *See also* The Queen (on the Application of Mazin Jumaa Gatteh Al Skeini et al. v. Sec'y of State for Def., [2005] 2 W.L.R. 1401, ¶ 285.
45. *Al Skeini*, [2006] 3 W.L.R. ¶ 126 (referring to *Golder v. United Kingdom*, 1 Eur. H.R. Rep. 524, ¶ 34 (1975)).

United Kingdom and that there had not been proper compliance with the State's obligations to protect the right to life and the freedom from torture, inhuman or degrading treatment. Two high-standing domestic courts confirmed and applied a State's human rights obligations to the actions of its agents overseas and during a time of conflict. This development has opened up an avenue of redress for victims of human rights violations committed during wartime and is highly important given the relatively weak enforcement mechanisms of international humanitarian law. It is clear that for future military undertakings the training of members of the armed forces of the United Kingdom will need to be adjusted in order to take on board the applicability of human rights law during armed conflict.[46]

Although the *Al-Skeini* decision is of enormous significance, marking a considerable step forward for the protection of human rights in the "war on terror," the decision itself, and the subsequent *Al-Jedda* case, point to continuing difficulties and hostility towards the extraterritorial application of human rights law.[47] The *Al-Jedda* case concerned a citizen of duel British and Iraqi nationality detained in Iraq as a threat to security.[48] Although the Courts seemed to uphold *Al-Skeini* in general terms, they held that in the post-occupation phase, the rights arising under the Human Rights Act and the European Convention could be qualified by United Nations Security Council Resolution 1546 (8 June 2004). This "startling" proposition by the United Kingdom government, as it was described in the High Court,[49] was accepted by the courts and is now being appealed to the House of Lords. The *Al-Skeini* case is also on appeal to the House of Lords, particularly with regard to

46. *See generally* ROWE, *supra* note 23.

47. For critiques of the decisions see Joanne Williams, Al Skeini: *A Flawed Interpretation of* Bankovic, 23 WIS. INT'L L.J. 687 (2005); Rarik Abdel-Monem, Patrick J.D. Kennedy & Ekaterian Apostolova, R(on the Application of Al-Skeini) v. Secretary of Defence: *A Look at the United Kingdom's Extraterritorial Obligations in Iraq and Beyond*, 17 FLA. J. INT'L L. 345 (2005); *see also* Michael J. Dennis, *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005).

48. The Queen (on the Application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Sec'y of State for Def., [2005] EWHC 1809 (Admin) *available at* http://www.bailii.org/ew/cases/EWHC/Admin/2005/1809.html; The Queen (on the Application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Sec'y of State for Def., [2006] EWCA Civ 327 *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2006/327.html.

49. *Al-Jedda*, [2006] EWCA Civ ¶ 34.

the deaths of the five persons who were not detained by British troops when they were killed. The principal ground of appeal revolves around the holding by the Courts that the United Kingdom did not have "effective control" over the relevant territory, with lawyers for the claimants contending that "where British armed forces personnel are, for example, performing policing functions, such as home raids, street patrols and manning check points, they are exercising authority and control and therefore, the HRA and ECHR should apply."[50]

III. "EFFECTIVE CONTROL"

In the jurisprudence of international and regional bodies concerning the extraterritorial application of human rights obligations, the lynchpin for many decisions has very often been the presence of effective control by state agents, over either individual persons or territory. The United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights in their findings on Israel have stressed this element of effective control over territories and populations.[51] The European Court of Human Rights has also broached the issue of "effective control" and has provided some guidance as to its meaning.[52] In a case arising out of Turkey's occupation of Northern Cyprus, the Court found that the obligations under the European Convention arose there because the area was under Turkey's "authority and control."[53] The *Banković* proceedings, relating to the NATO bombing of a Belgrade television station in April 1999, resulted in a declaration of inadmissibility by the Court because it found that it had no jurisdiction as the victims were not under the effective control of any of the States parties to the European Convention acting

50. *See* Public Interest Lawyers Statement, http://www.publicinterestlawyers.co.uk /cases/cases.php?id=34.

51. *See Concluding Observations of the Human Rights Committee: Israel*, U.N. GAOR, Hum. Rts. Comm., 63d Sess., 1694th mtg. ¶ 10, U.N. Doc. CCPR/C/79/Add.93 (1998); Comm. on Econ., Soc. and Cultural Rights, Report on the Eighteenth and Nineteenth Sessions, ¶ 234, U.N. Doc. E/1999/22 (1999).

52. Tarik Abdel-Monem, *How Far do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights*, 14 J. TRANSNAT'L L. & POL'Y 159, 2 (2005).

53. Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser A.) at ¶ 62 (1995) (preliminary objections); Assanidze v. Georgia, App. No. 71503/01, 39 Eur. H.R. Rep. 32, ¶¶138–145 (2004). This is a more recent case, in which the Court used the phrases "overall control," "effective control" and "effective overall control."

through NATO.[54] It was noted in the judgment that there had not been any NATO ground troops in place at the time and the Court seemed to reason that aerial dominance was not sufficient to trigger the application of the Convention.[55] The Court held that it had only recognized the extraterritorial application of the European Convention:

> [W]hen the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[56]

In the proceedings before the European Court brought on behalf of Saddam Hussein, the Court rejected the argument that the necessary control existed simply by virtue of membership in a coalition where one member of that coalition may have violated the rights of a particular individual under its control.[57]

The Court of Appeal in *Al-Skeini*, in denying that the United Kingdom exercised effective control in Basrah, reviewed the relevant Strasbourg jurisprudence and found that with regard to Northern Cyprus, "[i]t was obvious from the fact that more than 30,000 Turkish military personnel were engaged in active duties [there] that her army exercised effective control over that part of the island."[58] The claimants' argument that, as an occupying power, the United Kingdom was in effective control of the parts of Iraq it occupied for the application of human rights obligations, did not persuade either of the *Al-Skeini* Courts.[59] The Secretary of State had recognized the occupier status of the United Kingdom in the relevant parts of southern Iraq, and both Courts accepted this proposition without questioning whether indeed sufficient control was exercised by British troops for the purpose of occupation. There are obvious similarities between the requirement of "effective

54. *Banković v. Belgium*, App. No. 52207/99, Eur. Ct. H.R., ¶¶ 74–82 (2001).

55. *Id.* ¶¶ 52, 74–76.

56. *Id.* ¶ 71. For a critique of the decision see Kerem Altiparmak, Bankovic: *An Obstacle to the Application of the European Convention on Human Rights in Iraq?*, 9 J. CONFLICT & SEC. L. 213; Martin Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights, in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 73, 77–80 (Fons Coomans & Menno T. Kamminga eds., 2004).

57. Hussein v. 21 States, App. No. 23276/04, 42 Eur. H.R. Rep. SE16 at 223, 224–25 (Mar. 14, 2006) (Court Decision on Admissibility).

58. Al-Skeini v. Sec'y of State for Def., [2005] EWCA (Civ) 1609, [67], 2006 3 W.L.R. 508 (U.K.).

59. *See id.* ¶ 127. *But see* Williams, *supra* note 47, at 726.

control" for the application of human rights treaties and the conditions to be satisfied under the laws of armed conflict for a State to be considered an occupying power.

Article 42 of the 1907 Hague Regulations, comprising a rule of customary international law, provides that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[60] Article 43 of the Regulations speaks of "[t]he authority of the legitimate power having in fact passed into the hands of the occupant," and stipulates that "the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety."[61] The Fourth Geneva Convention of 1949 does not depart from this definition, but grants a broader protection to civilians by protecting them as soon as they fall into the hands of a Party to the conflict or an Occupying Power "of which they are not nationals."[62] The International Criminal Tribunal for the Former Yugoslavia has provided some useful guidelines for determining the existence of an occupation:

> [1.] the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;
>
> [2.] the enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;
>
> [3.] the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt; [and]
>
> [4.] a temporary administration has been established over the territory;

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60. Regulations Respecting the Laws and Customs of War on Land art. 42, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 19, 1907, 36 Stat. 2277 [hereinafter Hague Regulations]. The Regulations were seen as a codification of customary international law by the International Military Tribunal at Nuremberg. International Military Tribunal (Nuremberg), Judgment and Sentences, 1 Oct. 1946, *reprinted in* 41 AM. J. INT'L L. 172, 248–49 (1947).

61. Hague Regulations, *supra* note 60, art. 43.

62. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *supra* note 10, art. 4; *see also id.* arts. 2, 6; 4 THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 59 – 60 (Jean Pictet ed., 1958).

> the occupying power has issued and enforced directions to the civilian population.63

The foregoing demonstrates that there are exacting requirements to be met under international humanitarian law in order for a State to qualify as an occupying power. This prompts the question as to whether the authority and control necessary for an occupation under the laws of armed conflict can be equated with the "effective control" necessary for the application of human rights treaties. It is clear that occupations can vary from peaceful ones, as was the case in Germany after the Second World War, to highly volatile ones, where occupying forces may be under sustained attacks.[64] If one deems the fact of occupation as sufficient to meet the effective control requirement for the purpose of applying human rights treaties extraterritorially, then it may avoid a situation where an occupier may seek to reduce the number of troops present in order to otherwise relinquish any "effective control."[65] In the *Al-Skeini* proceedings, the Court of Appeal found that the situation in Basrah was unstable and that it would be contrary to Coalition policy to maintain more forces in Iraq "when its overarching policy was to encourage the Iraqis to govern themselves."[66] In a similar vein, this approach would also counteract the inclination of an occupying force not to assume "all or some of the public powers" normally exercised by the previous government, as required under international humanitarian law, in order to avoid the application of human rights obligations.[67]

It is proposed that rather than dismissing the application of

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63. Prosecutor v. Naletilic, Case No. IT-98-34-T, Judgment, ¶ 217 (Mar. 31, 2003) (footnotes omitted).

64. *See generally* Univ. Ctr. for Int'l Humanitarian Law, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, Sept. 1–2, 2005, *available at* http://www.ucihl.org/communication/Right_to_Life_Meeting_Report.pdf (discussing international humanitarian law and international human rights law and how they differ when addressing situations of occupation).

65. This would probably violate the occupier's obligation under Article 43 of the Hague Regulations to maintain public order and safety. *See* Hague Regulations, *supra* note 60, art. 43; Regulations Respecting the Laws and Customs of War on Land art. 43, annexed to Hague Convention (II) Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803.

66. Al-Skeini v. Sec'y of State for Def., [2005] EWCA (Civ) 1609, [125] (Eng.), [2006] 3 W.L.R. 508.

67. Rick Lawson, *Life After* Bankovic*: On the Extraterritorial Application of the European Convention on Human Rights,* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, *supra* note 9, at 83, 111.

the European Convention and the Human Rights Act on the basis of the volatility of the situation in and around Basrah, this issue could have been taken into consideration in the determination of whether there had been a violation of a substantive right. If serious hostilities were to resume in an area under occupation, the conduct of armed forces could then be assessed solely under humanitarian law. Rather than allowing for the non-applicability of human rights law outright in such a circumstance, such a lack of stability could then be considered in the assessment of whether particular rights have been violated. This solution would avoid the blanket rejection of any human rights obligations, on the basis of a general lack of control, while also taking into consideration genuine security and military concerns of an occupying force.

The International Court of Justice seems to have adopted such an approach in recent times, holding that during a situation of occupation, a State's human rights obligations automatically apply. In its judgment in *Democratic Republic of Congo* v. *Uganda*, the Court found that Uganda was bound by its human rights obligations in those parts of the DRC where it could be considered an occupying power, i.e., where its armed forces were stationed and "had substituted their own authority for that of the Congolese Government."[68] The Court held that an occupying power's obligations under Article 43 of the Hague Regulations "comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party."[69] The Human Rights Committee has held that in 1991 Iraq had a "clear responsibility under international law for the observance of human rights during its occupation of [Kuwait]."[70]

This approach holds considerable merit because of the

68. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ¶ 173 (Judgment of Dec. 19, 2005), *available at* http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm (last visited Feb. 10, 2007).

69. *Id.* ¶ 178.

70. Human Rights Committee, *Report of the Human Rights Committee*, ¶ 652, U.N. Doc. A/46/40 (Oct. 10, 1991). One could also apply such an interpretation to the Human Rights Committee's observations with regard to Israel's obligations *vis-à-vis* the territories it occupies: "[T]he Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa where Israel exercises effective control." *Concluding Observations of the Human Rights Committee: Israel*, *supra* note 51, ¶ 10.

highly unique nature of occupation, with the previous power having been displaced and "the occupier ha[ving], effectively, denied the opportunity for the citizens of that territory to rely upon their own State to protect their human rights."[71] The comparison can readily be made with the situation of a non-international armed conflict occurring within a State's own borders in which a non-State armed group exercises control over territory.[72] This is currently the case in Colombia, and while the Colombian State may not be able to fully live up to its human rights obligations in the area controlled by FARC, given that it no longer exercises effective control there, it could not deny outright the application of its human rights obligations to the citizens residing there.

IV. CONCLUSION

In the ongoing "war on terror," powerful States have acted in disregard of many of the cardinal principles of international law. Rules laid down in the Charter of the United Nations, the Universal Declaration of Human Right, and the 1949 Geneva Conventions have been sidelined in the pursuit of the amorphous goals of this seemingly never-ending venture. Despite these violations, and the attempts to undermine international law itself, the legal norms applicable to recent events have demonstrated resilience, and persevering human rights litigation has begun to yield results for victims of the "war on terror." Relatives of those killed by British soldiers in Iraq have had some success in utilizing the Human Rights Act of 1998 and the European Convention on Human Rights to seek redress for those deaths. The continuing *Al-Skeini* proceedings, and the potential for further cases,[73] have helped to progress

71. ROWE, *supra* note 23, at 128.

72. Additional Protocol II to the 1949 Geneva Conventions only applies to conflicts in which the non-State armed groups, *inter alia*, "exercise[s] such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609. The authoritative Commentary to the Additional Protocols asserts that the territory which the non-State group can claim to control will generally be that "which escapes the control of the government armed forces." CLAUDE PILLOUD, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1353 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987).

73. Mattew Hickley, 'Soldiers face a flood of human rights lawsuits', *The Daily*

both the debate and the law on the extraterritorial application of human rights law in times of armed conflict.

The application of human rights law beyond a State's own borders has arisen primarily because of the errant behaviour of those States and the straightforward interpretation of the jurisdictional provisions of various human rights treaties by their monitoring bodies. Additionally, in times of armed conflict, human rights law can provide better avenues of redress than international humanitarian law, given that the two primary avenues for accountability under the latter, inter-State proceedings and the trial of individual offenders, "cannot be accessed directly by individuals."[74] Many violations of international humanitarian law would not reach the level of gravity necessary to come before international tribunals, such as the International Criminal Court.[75] Human rights law also works in a complementary way to international humanitarian law when it comes to issues such as fair trial, detention, and the protection of life. Its application in times of armed conflict furthermore avoids any gaps in legal protection and allows for "consistent rule of law coverage."[76] Utilization of the mechanisms provided for under international human rights law can in theory provide more than just a civil remedy for violative conduct—a lawyer acting for the relatives in the *Banković* proceedings articulated that the principal concern of the victims was "to establish truth and accountability."[77]

This article has demonstrated some of the remaining challenges presented by applying human rights law extraterritorially in times of armed conflict. The meaning of "effective control," in particular, continues to generate disagreement and it is proposed that in order to enhance the protection of the rights of a civilian population under occupation, this "effective control" requirement is automatically

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Mail, 22 December 2005, p. 25; Christopher Booker, 'How Blair is destroying our Forces', *The Sunday Telegraph*, 18 June 2006, p. 14.

74. Emanuela-Chiara Gillard, *International Humanitarian Law and Extraterritorial State Conduct*, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, *supra* note 9, at 25, 37.

75. Article 8 of the Rome Statute states that "[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." Rome Statute of the International Criminal Court, *supra* note 11, art. 8.

76. Fionnuala Ni Aoláin, *The No-Gaps Approach to Parallel Application in the Context of the War on Terror*, ISRAEL L. REV. (forthcoming 2007).

77. Natasha Joffe, *Law: At War with NATO*, GUARDIAN (London), Oct. 23, 2001, at 16.

satisfied where an occupation exists under international humanitarian law. Although the intricacies of the relationship between international human rights law and international humanitarian law need to be fully worked out, by and large, the principle that human rights law has extraterritorial application in times of armed conflict is now well-established. Although this development preceded the attacks of September 11, events in the "war on terror" have contributed to the advancement of this important step forward in the protection of human rights.